Supreme Court, U.S.
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No. ___

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In The

Supreme Court of the United States

JOSE R. MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a known drug dealer's presence at an apartment, not reasonably thought to be his dwelling, before or after he sells drugs, is sufficient to establish probable cause to search the apartment.

2. If the search warrant lacked probable cause, did the good faith exception apply to allow the Government to use at trial evidence obtained as a result of the illegal search.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
A. The Court Of Appeals' Decision Is Incorrect And Departs From The Approach Of Other Courts Of Appeals And This Court	6
B. The Question Presented Is One Of Recurring Importance That Warrants This Court's Intervention	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES:

Fisher v. United States, 425 U.S. 391 (1976) 8

Greenstreet v. County of San Bernardino, 41 F.3d 1306 (9th Cir. 1994) 7, 8

United States v. Cruzi, 867 F.2d 36 (1st Cir. 1989) 7

United States v. Huguez-Ibarra, 954 F.2d 546 (9th Cir. 1992) 8

United States v. Lalor, 996 F.2d 1578 (4th Cir. 1993) 7

Zucher v. Stanford Daily, 436 U.S. 547 (1978) 8

STATUTES AND RULES:

18 U.S.C. § 3231 4

21 U.S.C. § 841(a)(1) 3, 4

21 U.S.C. § 841(b)(1)(B) 3,4

21 U.S.C. § 846 3

28 U.S.C. § 1254 1

28 U.S.C. § 1291 4

PETITION FOR A WRIT OF CERTIORARI

Jose R. Martinez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-6), is unpublished and appears at 62 Fed. Appx. 657, 2003 WL 1544985 (7th Cir. Ill.). The district court's opinion (App. 8-14) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 23, 2003. A petition for rehearing or rehearing en banc was denied on April 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the evening of September 25, 2000, a team of FBI agents and Illinois State Troopers searched an apartment located at the rear of a residence at 436 West Poplar Street, in Harrisburg, Illinois. There the police found the petitioner, Jose R. Martinez, and his roommate, Luis Diaz. They also found illegal drugs (marijuana and crack cocaine) and other drug paraphernalia.

The police searched Martinez's apartment pursuant to a search warrant obtained earlier that day. Nothing in the affidavit supporting the search warrant for Martinez's apartment alleged that Martinez or Diaz kept illegal drugs in the apartment. Nor does it state that the police had observed illegal drugs or drug dealing at the apartment. In fact, the affidavit never mentions either Martinez or Diaz – the affidavit lacks any information about who lived in the private residence the police wanted to search. (App. 16-20.)

Instead, the affidavit outlines the FBI's use of a confidential source to purchase crack cocaine from a known drug dealer, Michael Helton, over a thirteen day period in September of 2000. Helton did not live at the 436 West Poplar apartment. Instead, the affidavit states that the police at times saw Helton at the apartment before or after he sold drugs. To this end, the affidavit states (App. 17-19):

a. On September 12, 2000, the police observed Helton purchase crack cocaine from a confidential source.

b. The next day, on September 13, 2000, the police observed Helton purchase crack cocaine from a confidential source. After the transaction, the police observed Helton go to the apartment.

c. A few hours later, the police again observed Helton purchase crack cocaine from a confidential source. After the transaction, the police observed Helton go to the apartment.

d. Five days later, on September 18, 2000, the police observed Helton purchase crack cocaine from a confidential source.

e. Seven days later, on September 25, 2000, the police observed Helton purchase crack cocaine from a confidential source. The police observed Helton leave the apartment prior to the transaction and, after the transaction, return to the apartment.

Also, the affidavit alleges that the confidential source related to police a conversation in which Helton told the confidential source he was "set up" near a certain Hucks store. According to the affidavit, the apartment police wanted to search is located less than one block from the Hucks store. (App. 18-19.)

The Government charged Martinez, Diaz, and Helton with one count of conspiring to distribute, and to possess with intent to distribute, more than 5 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. Also, it charged Martinez with one count of knowingly and intentionally possessing with intent to

distribute more than 5 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The district court had exclusive jurisdiction over these offenses under 18 U.S.C. § 3231.

Martinez moved to suppress all evidence obtained from the search. The district court denied the motion. It held there was probable cause to search the apartment for illegal drugs, because it was reasonable to assume "that a drug seller would go directly to or from his drug operation 'set up' before or after a drug transaction." (App. 12.) The district court further noted that although it "seriously doubted" that the confidential source's vague information was sufficient to establish probable cause, it provided some support to the probable cause finding. (App. 13-14.)

A trial followed. The jury found Martinez guilty of both counts, and the district court entered judgment against Martinez and sentenced him to 190 months imprisonment for each count, to run concurrent with one another, to be followed by 5 years of supervised release.

Martinez challenged the search warrant on appeal. The court of appeals had jurisdiction over the appeal under 28 U.S.C. § 1291. It affirmed, based on the following reasoning (which it quoted from the district court's opinion):

> Common sense tells the Court that a drug seller must visit the location where he keeps his drugs and drug-related items some time before a drug sale in order to pick the drugs up, and that a drug seller must return to the location where he keeps the proceeds of the sale some time after the sale to deposit his ill-gotten gains. Despite Martinez's protestations to the contrary, the Court finds that it was completely proper for [the

> Magistrate] to conclude that a drug seller would go *directly* to or from his drug operation "set up" before or after a drug transaction.

(App. 5.) The court of appeals added: "the frequency with which Helton visited the 436 residence close to the times of his known drug transactions adds to the reasonableness of the magistrate's [probable cause conclusion]." (*Id.*) The court of appeals cited no authority to support its decision.

Finally, the court of appeals held that even if the warrant lacked probable cause, "there is no doubt that the search in this case would be upheld under the 'good faith' exception to the exclusionary rule. . . . " (App. 2-3.) The court of appeals cited no authority and provided no further explanation for its decision.

REASONS FOR GRANTING THE PETITION

The rationale underpinning the court of appeals' probable cause analysis departs from the approach taken by other circuits in similar situations and conflicts with decisions by this Court. Essentially, the court of appeals reasoned that although the police had no information about the residence or its occupants, had no evidence of illicit drug dealing or other criminal activity at or near the residence, and had no information about why Helton may have visited the residence, the police nevertheless had probable cause to search the residence, because, as a matter of law, it is reasonable to assume that drug dealers go to or from their drug operation "set up" before or after a drug transaction. By making the visitor's status as a drug dealer the critical element in the probable cause analysis,

the court's reasoning has broad implications, for it threatens to eviscerate the established rule that the police have probable cause to search a private residence only if they can establish a meaningful connection between (1) the criminal activity committed or about to be committed, and (2) the place to be searched.

The decision below cannot be reconciled with the rationale employed by other courts of appeals in similar situations. Nor can it be reconciled with this Court's probable cause jurisprudence holding that the critical element in a reasonable search is not that the visitor or owner of the property is suspected of a crime, but that there is a reasonable cause to believe that the specific "things" to be seized are located on the property to be searched. The mere presence of a known criminal at a private residence, without more, has never been sufficient to subject that residence to search, and the court of appeals cited no authority for its conclusion otherwise. For these reasons, and because the question presented is a recurring and important issue of federal law, the court of appeals' decision warrants review by this Court.

A. The Court Of Appeals' Decision Is Incorrect And Departs From The Approach Of Other Courts Of Appeals And This Court

No court, including this Court, has ever held that the police may search a residence because they observe a known drug dealer at the residence before or after a drug transaction. Nor has any court, including this Court, ever held that, as a matter of law, it is reasonable to assume that drug dealers go directly to and from their "set-up" when dealing drugs. The decision of the court of appeals is not only incorrect, but its underlying rationale departs

from the reasoning of other courts of appeals and this Court's interpretation of the Fourth Amendment's probable cause requirement. Indeed, in similar situations, other courts of appeal have adopted a contrary rule that observing a known drug dealer at a residence fails to establish a nexus between the contraband sought and the residence.

For example, the First Circuit in *United States v. Cruzi*, 867 F.2d 36, 46 (1989), held that a search warrant lacked probable cause, because "a suspect's presence at a dwelling not reasonably thought to be his abode or the abode of a criminal confederate, without more, is too tenuous a connection to establish a meaningful relationship between the suspect and the contents of the house." The affidavit there stated only that a known criminal drove to the residence, that he was apprehended there the next morning, and (by inference) that he spent the night.

The Fourth Circuit in *United States v. Lalor*, 996 F.2d 1578, 1583 (1993), held that there was no probable cause to search a home, because "[i]n this circuit and other circuits, residential searches have been upheld only where some information links the criminal activity to the defendant's residence." The affidavit did not describe circumstances indicating that evidence of drug activity would be found at the defendant's residence, and provided no evidence of the distance between the defendant's residence and the drug sales police observed. *Id.* at 1582-83.

Finally, the Ninth Circuit in *Greenstreet v. County of San Bernardino*, 41 F.3d 1306, 1309 (1994), held that "[m]erely stating that [the drug dealer] was surveilled to [the residence], without any other information as to his activities, 'is not sufficient to permit an inference' that [the

drug dealer] was other than 'a causal social guest' at [the] residence." Thus, an affidavit stating that police saw a known drug offender at the location of drug activity and also at the residence failed to establish a nexus between contraband and residence. The drug dealer "could have been there for any number of reasons, none of which may be inferred from the dearth of information provided in the affidavit." *Id.* at 1310. Also, in *United States v. Huguez-Ibarra*, 954 F.2d 546, 551-52 (9th Cir. 1992), the court of appeals found no probable cause to search a residence based on the police linking automobiles frequenting the residence to "affiliates" of narcotics organizations and "facilitators" of narcotics trafficking. The evidence established only that the residents of the house were acquaintances of people linked to the narcotics trade; it was insufficient to give rise to a fair probability that the residence was a locus of criminal activities. *Id.*

The rationale of these cases embody the established rule that the "critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is a reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zucher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Only "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, [does] the invasion of privacy [become] justified and a warrant to search and seize will issue." *Fisher v. United States*, 425 U.S. 391, 400 (1976).

In stark contrast, the critical element to the Seventh Circuit's rationale is that a visitor to the residence is a known drug dealer. The Seventh Circuit gave no attention or weight to the fact that the affidavit provided no evidence about the residence police wanted to search. The

affidavit contained no evidence of illegal drugs or criminal activity at the residence, and no evidence from which one could reasonably infer that the drug dealer's visits to the residence were otherwise connected with his drug dealing activity elsewhere. In fact, the affidavit contains no evidence about who may have lived in the apartment police wanted to search, let alone evidence from which one could infer that the residence's occupants were otherwise involved in drug dealing. By focusing on the status of the visitor as a known drug dealer, and not whether the affidavit contained allegations sufficient to show that evidence of drug dealing would probably be found at the apartment, the Seventh Circuit's reasoning is in error and cannot be reconciled with the rationale adopted by the court of appeals' decisions cited above. Indeed, the Seventh Circuit itself made no attempt to do so, and it cited no law in support of its holding.

B. The Question Presented Is One Of Recurring Importance That Warrants This Court's Intervention

Review of this case is appropriate because the question presented is important, and the factual scenario is a recurring one. The police regularly observe drug deals and follow drug dealers to learn more about their operations and the individuals with whom they conspire. In doing so, they undoubtedly have opportunities to observe these drug dealers visit private establishments and residences as they pursue both their illegal venture and the more ordinary business of life. If the court of appeals' decision stands uncorrected, any of these private establishments and residences are subject to search, because, according to the Seventh Circuit, it is reasonable as a matter of law to

assume that drug dealers go directly to and from their "set up" before or after dealing drugs. The Seventh Circuit failed to inquire about evidence linking the drug dealer and his crimes to the residence, and it improperly made the critical element in the probable cause analysis the criminal status of the visitor to the residence. By doing so, the Seventh Circuit has announced a rule under which the police have probable cause to search an individual's house for no other reason then that they occasionally see a drug dealer there before or after dealing drugs, even if the drug dealer is simply a plumber returning to his work site or a neighborhood kid visiting a friend. Such reasoning is contrary to established law and threatens to eviscerate any protections the Fourth Amendment may provide against the police searching a home. The issue warrants this Court's attention.

There is no sufficient reason for this Court to await further developments in the Seventh Circuit or other courts of appeal before reviewing the questions presented. The court of appeals has already declined rehearing en banc, and, given the unequivocal nature of its opinion, there is no reason to suspect that it will reverse its reasoning in the future. Moreover, the Seventh Circuit's decision is readily available at 62 Fed. Appx. 657, 2003 WL 1544985 (7th Cir. Ill.), and, although unpublished, it represents a ruling of law by that court of appeals. Indeed, the case appears under the headnote CONTROLLED SUBSTANCES, 96Hk146, for the proposition that "Evidence that drug seller visited residence close to times of his known drug transactions was sufficient to support issuance of search warrant for residence in connection with narcotics investigation." As such, the decision will no doubt carry substantial persuasive weight, both with the district courts in the Seventh Circuit and in other circuits, meaning the

court of appeal's flawed reasoning will undoubtedly find its way into subsequent Fourth Amendment search cases.

The decision also undermines the Fourth Amendment's tempering effect on police conduct. The Government may still use evidence obtained as a result of an illegal search if the police have a "good faith" basis to believe that the search warrant was properly issued. Absent this Court's intervention, even if another court of appeals or district court finds that a search warrant issued in similar circumstances lacked probable cause, the Seventh Circuit's decision will provide police with a "good faith" basis to rely on the otherwise illegal warrant to search the home.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 24, 2003
Decided March 24, 2003

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 02-1494

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE R. MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 00-CR-40093

James L. Foreman, *Judge.*

ORDER

A jury convicted Jose Martinez on charges of conspiring to distribute crack cocaine and a substantive count of crack cocaine possession. He appeals, raising only the legality of the search that resulted in the gathering of the bulk of the evidence that was used to convict him. Because Martinez doesn't challenge the sufficiency of the evidence supporting his conviction, we will only note the facts concerning the search issue.

In September 2000, a magistrate judge issued a search warrant for premises described as "A red, wood-framed addition, which has a white door that faces west,

and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois." The warrant authorized a search of the residence for "concealed property, namely, crack cocaine, United States currency including pre-recorded monies, scales, drug paraphernalia, packaging materials and other indicia of illegal drug activity, drug records including notes and memos of amounts paid and quantities sold, and bills, papers, and documents showing the identity of the occupants, which is evidence of a criminal offense, namely, the knowing distribution, and possession with intent to distribute, cocaine base, commonly known as 'crack cocaine,' in violation of Title 21, United States Code, Section 841(a)(1)." With warrant in hand, law enforcement officers went to the residence at 436 West Poplar to execute the search.

Martinez was at the residence during the search with, unfortunately for him, crack cocaine on his person. In the residence itself, law enforcement officers found some 75 grams of crack in the refrigerator, scales for weighing drugs, plastic baggies, and some marijuana.

After the search, Martinez told conflicting stories, but eventually he said he wanted to cooperate with law enforcement officers. Among other things, he told the officers that some $2,500 was hidden inside the residence. Officers then returned to the residence and found the money right where Martinez said it would be. Martinez made more incriminating statements after the officers returned from their second trip to the 436 residence.

Although there is no doubt that the search in this case would be upheld under the "good faith" exception to the exclusionary rule if the search warrant Martinez attacks

were actually defective, *United States v. Leon,* 468 U.S. 897 (1984), we need not rest our decision on the exception because the rule requiring a demonstration of probable cause for the issuance of the warrant was not breached.

The magistrate judge issued the search warrant based on a detailed affidavit from Tim Kirkham, a Special Agent with the FBI. The affidavit detailed activities of an informant (the "CS," for "confidential source," in the affidavit) who was working with law enforcement officers to build a case against a nest of drug dealers. Here are some of the allegations (we paraphrase them) in the Kirkham affidavit, with the information relating, directly or indirectly, to the "436 residence" in bold:

> On September 13, 2000, immediately after the CS, who had proven reliable, purchased $300.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL, **law enforcement agents followed HELTON directly back** to the 436 Residence.
>
> On the same date, a couple of hours later, the CS purchased $400.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. Once again, immediately after the transaction, **law enforcement agents followed HELTON directly back** to the 436 Residence.
>
> On September 24, 2000 (the day before the search warrant was issued), the CS advised Special Agent Kirkham that HELTON told the CS that HELTON was going to be receiving a large quantity of crack cocaine. **HELTON told the CS that HELTON was "set up" (had a base of operations) near a specific Huck's store in Harrisburg, Illinois.** The 436 Residence **is located**

> **less than 1 block from that very same Huck's store described by HELTON.**
>
> On September 25, 2000, the CS purchased $400.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. Prior to the transaction, law enforcement agents surveilled HELTON leaving the 436 Residence. **HELTON went directly from the foregoing described residence to the location where the crack cocaine transaction with the CS took place.**
>
> During the September 25th transaction, **HELTON advised the CS that HELTON had 3 1/2 ounces of crack cocaine left to distribute. Immediately following the crack cocaine sale to the CS, law enforcement agents followed HELTON directly back to the 436 Residence.**

Martinez's argument is straightforward, but unpersuasive. He says that the Kirkham affidavit fails to establish a nexus between drug dealing and the 436 residence. It offers no evidence, says Martinez, that Helton used the 436 residence as a "base of operations." With this observation, we cannot agree.

The magistrate judge here could issue the warrant if he had a "substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). And we give deference to a magistrate judge's decision to issue the warrant unless we believe that the judge was clearly in error. *United States v. Pless*, 982 F.2d 1118, 1124 (7th Cir. 1992). Finally, as *Gates* instructs, the duty of the magistrate is to only make a practical, common-sense decision whether, given all the

circumstances, there exists a fair probability that contraband or evidence of a crime will be found in a particular case. The test was satisfied here.

As Judge Foreman noted in rejecting Martinez's challenge to this warrant,

> Common sense tells the Court that a drug seller must visit the location where he keeps his drugs and drug-related items some time before a drug sale in order to pick the drugs up, and that a drug seller must return to the location where he keeps the proceeds of the sale some time after the sale to deposit his ill-gotten gains. Despite Martinez's protestations to the contrary, the Court finds that it was completely proper for Magistrate Judge Frazier to conclude that a drug seller would go *directly* to or from his drug operation "set up" before or after a drug transaction."

We agree with the district judge's observations. In addition, the frequency with which Helton visited the 436 residence close to the times of his known drug transactions adds to the reasonableness of the magistrate's conclusion that evidence of drug sales would probably be found there.

For these reasons, we think the search warrant in this case is antiseptic and thus immune to Martinez's attack upon it. From this finding, of course, flows the logical conclusion that the post-search statements Martinez gave to the officers were not suppressible as fruit of the poisonous tree.

Martinez's final argument relates to the district court's decision to permit the jury to hear, under Rule 404(b) of the Federal Rules of Evidence, evidence about his prior drug-dealing activities under Rule 404(b) of the

Federal Rules of Evidence. We reject this argument as well. The evidence was relevant to the issues of his knowledge, intent, motive, and lack of mistake, and showed a prior drug-dealing relationship between Martinez and a coconspirator, Luis Diaz. In addition, the district judge gave the jury an instruction concerning the limited purposes for which the evidence could be used.

AFFIRMED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 24, 2003

BEFORE:

Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable TERRANCE T. EVANS, Circuit Judge

Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 02-1494

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE R. MARTINEZ,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Illinois

No. 00 CR 40093, James L. Foreman, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	)
v.	) **Case No.**
JOSE R. MARTINEZ,	) **00-CR-40093-JLF**
	)
Defendant.	)

MEMORANDUM AND ORDER

(Filed Aug. 27, 2001)

FOREMAN, District Judge:

Before the Court is defendant Jose R. Martinez's motion to suppress (Doc. 68). Martinez asks the Court to suppress evidence that was discovered pursuant to a search warrant that he claims was not supported by probable cause. The government has responded to the motion (Doc. 72), and Martinez has replied to that response (Doc. 73).

I. Background

Martinez was indicted on October 5, 2000, on one count of conspiring to distribute and possess with intent to distribute more than five grams of a mixture and substance containing crack cocaine and on one count of possessing with intent to distribute more than five grams of a mixture and substance containing crack cocaine. The indictment was superseded on February 6, 2001, but no new counts were added against Martinez.

Martinez asks the Court to suppress evidence that was obtained in a search of an addition to a building at 436 West Poplar in Harrisburg, Illinois ("436 Residence") that was conducted pursuant to a warrant. The application for the warrant was supported by an affidavit of FBI special agent Tim Kirkham, which provided the foundation for Magistrate Judge Frazier's finding of probable cause. Specifically, Kirkham stated that he believed crack cocaine and other evidence relating to the sale of illegal drugs was in the 436 Residence. He stated in his affidavit that surveillance of a crack cocaine seller (one of Martinez's co-defendants) had revealed that (1) on three occasions the seller went directly to the 436 Residence after a drug transaction and (2) on one of those three occasions the seller left the 436 Residence immediately before the drug transaction and went directly to the transaction. Kirkham also stated that the seller had told a confidential informant, who had given reliable information to law enforcement in the past, that the seller's drug-selling operation was set up near a specific convenience store. That store was less than a block away from the 436 Residence. Kirkham also stated that based on his law enforcement experience, records relating to drug sales are kept near an operation's "set up" or near sales location and that scales, packaging materials, money and guns were often kept in the same location.

Based on this sworn information, Magistrate Judge Frazier found that there was probable cause to believe that evidence of a crime was present in the 436 Residence and issued a warrant to search the premises for "crack cocaine, United States currency including pre-recorded buy monies, scales, drug paraphernalia, packaging materials and other indicia of illegal drug activity, drug records, including

notes and memos of amounts paid and quantities sold, and bills, papers, and documents showing the identity of the occupants."

Martinez takes issue with Magistrate Judge Frazier's finding of probable cause based on information contained in Kirkham's affidavit. Martinez argues that drug dealers must be very secretive of their trade since they cannot rely on the protection of the law to ensure that their transactions do not go awry. Because of this, he argues, it is unlikely that a drug seller would come directly from or return directly to the place where his drug operation was set up immediately before or after a drug transaction. If he did, law enforcement officers or thieves would be likely to discover his operation. Martinez argues that Magistrate Judge Frazier's implicit conclusion that a drug seller would come directly from or go directly to his drug operation set up is logically flawed. In view of this supposed flaw, Martinez believes the finding of probable cause based on the affidavit was insufficient as a matter of law.

Because the Court can decide this motion by reviewing the application for warrant on its face and because Martinez does not challenge the veracity of statements within that application, there is no need to hold a hearing.

II. Fourth Amendment Standards

The Fourth Amendment to the Constitution provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S.

Const. amend. IV. In *Illinois v. Gates*, 462 U.S. 213, 236 (1983), the Supreme Court reaffirmed the traditional standard for review of an issuing judge's probable cause determination: "so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." (citation omitted). The *Gates* Court went on to say:

> [W]e reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. . . . The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 239-40 (citations omitted).

A court should give great deference to a magistrate judge's decision and should affirm a determination of probable cause unless the magistrate judge was clearly in error. *Gates*, 462 U.S. at 236; *United States v. Pless*, 982 F.2d 1118, 1124 (7th Cir. 1992). Accordingly, a court should resolve doubtful cases in favor of upholding the warrant. *Pless*, 982 F.2d at 1124.

III. Analysis

After considering the totality of the circumstances as they were known to Magistrate Judge Frazier at the time

of the application for the warrant, the Court finds that Magistrate Judge Frazier had a substantial basis for inferring that a search of the premises in question would reveal evidence of wrongdoing. First, common sense tells the Court that a drug seller must visit the location where he keeps his drugs and drug-related items some time before a drug sale in order to pick the drugs up, and that a drug seller must return to the location where he keeps the proceeds of the sale some time after the sale to deposit his ill-gotten gains. Despite Martinez's protestations to the contrary, the Court finds that it was completely proper for Magistrate Judge Frazier to conclude that a drug seller would go *directly* to or from his drug operation "set up" before or after a drug transaction. *See, e.g., United States v. Singleton*, 125 F.3d 1097, 1102-03 (7th Cir. 1997) (reasonable to infer that drug seller went directly from his supply source to customer). Even though it may be important for a drug seller to keep the location of his operations secret, a savvy drug dealer may also try to minimize the opportunity that his drugs or other evidence may be discovered in a search under the "automobile exception" or the "search incident to arrest" exception to the warrant requirement. He may also want to minimize the number of witnesses to his journey to the drug transaction. Such a drug seller would want to make direct and short trips to and from his drug transactions, abiding by even the most minute traffic regulations in the process. It was not unreasonable for Magistrate Judge Frazier to infer that the drug seller in question was such a person. In addition, the frequency with which the drug seller in this case visited the 436 Residence close to the times of known drug transactions adds to the reasonableness of Magistrate Judge Frazier's conclusion that evidence of drug sales was present here.

The Court also notes that Kirkham's affidavit states that a confidential informant who had proven reliable in the past reported that the drug seller had told him that the drug operation was set up near a particular convenience store. When considering whether information from a confidential informant's tip helps to establish probable cause, a court should "giv[e] significance to each relevant piece of information and balanc[e] the relative weights of all the various indicia of reliability (and unreliability) attending the tip." *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984). A deficiency in an informant's reliability or the basis for his knowledge "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates*, 462 U.S. at 233. For example, an affiant's conclusory statement that an informant had been reliable in the past is insufficient by itself to give weight to the confidential informant's statement. *Gates*, 462 U.S. at 239 (citing *Aguilar v. Texas*, 378 U.S. 108 (1964)). However, other indicia of reliability may allow a magistrate judge to give some weight to the informant's information. *Gates*, 462 U.S. at 233.

In this case, the confidential informant had conducted at least three purchases from the seller prior to his statement and would therefore appear to have some basis for the seller to talk to him about the seller's operation. Furthermore, the confidential informant's statement was corroborated to some degree by surveillance of the drug seller, which revealed that before and/or after drug transactions, the seller frequented a place that fell within the confidential informant's description of the location of the drug operation's "set up." While the Court seriously doubts that the confidential informant's statement alone would

provide probable cause to search the premises in question, the Court finds that it is entitled to some weight in view of the corroborating surveillance evidence supporting the probable cause finding.

In sum, the Court finds that in light of the totality of the circumstances presented to Magistrate Judge Frazier, there was a substantial basis to believe that evidence of a crime would be found in the 436 Residence. For this reason, the Court hereby **DENIES** the motion to suppress (Doc. 68). Because the Court finds that the warrant issued by Magistrate Judge Frazier was supported by probable cause based on the four corners of the application for the warrant, the Court need not address the "good faith" exception of *United States v. Leon*, 468 U.S. 897 (1984).

IV. Speedy Trial Act

Pursuant to 18 U.S.C. § 3161(h)(1)(F), the Court finds that the period that Martinez's motion to suppress was pending, from July 23, 2001, up to and including August 20, 2001, is **EXCLUDABLE** under the Speedy Trial Act.

IT IS SO ORDERED.

DATED: Aug. 27, 2001

/s/ James L. Foreman
DISTRICT JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 21, 2003

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 02-1494

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* JOSE R. MARTINEZ, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Illinois No. 00-CR-40093 James L. Foreman, *Judge.*

ORDER

On April 7, 2003, the defendant-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and for rehearing en banc are therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN THE MATTER OF THE SEARCH OF	)	**CASE NO.** 00-405OM-PMF
A red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois	)	**FILED UNDER SEAL**

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

(Filed Sep. 25, 2000)

I, Tim Kirkham, being duly sworn depose and say:

I am a Special agent with the Federal Bureau of Investigation and have reason to believe that on the premises known as:

> **A red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois**

in Saline County, in the Southern District of Illinois, there is now concealed property, namely, crack cocaine, United States currency including pre-recorded monies, scales, drug paraphernalia, packaging materials and other indicia of illegal drug activity, drug records including notes and memos of amounts paid and quantities sold, and bills,

papers, and documents showing the identity of the occupants, which is evidence of a criminal offense, namely, the knowing distribution, and possession with intent to distribute, cocaine base, commonly known as "crack cocaine," in violation of Title 21, United States Code, Section 841(a)(1).

Facts to support the issuance of a Search Warrant are as follows:

1. I am a Special Agent with the Federal Bureau of Investigation and have been so employed for the past five (5) years. The information in this Application is based upon my own personal knowledge and on information provided to me by other law enforcement officers.

2. The address at 436 West Poplar, Harrisburg, Illinois, is a light colored, stone residence with a red, wood-framed addition attached to the rear of the residence. The red, wood-framed addition is believed to be a separate apartment and has a white door that faces the west.

3. On September 12, 2000, a Confidential Source (CS), who has given reliable information to law enforcement in the past, purchased $300.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. CS was wearing recording equipment and agents were performing surveillance. The crack cocaine was field tested and tested positive for the presence of cocaine.

4. On September 13, 2000, CS purchased $300.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. CS was wearing recording equipment and agents were performing surveillance. The crack cocaine was field tested and tested positive for the presence of

cocaine. Subsequent to the transaction, law enforcement agents followed HELTON directly back to the red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois.

5. On September 13, 2000, a couple of hours later, CS purchased $400.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. CS was wearing recording equipment and agents were performing surveillance. The crack cocaine was field tested and tested positive for the presence of cocaine. Subsequent to the transaction, law enforcement agents followed HELTON directly back to the red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois.

6. On September 18, 2000, CS purchased $200.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. CS was wearing recording equipment and agents were performing surveillance. The crack cocaine was field tested and tested positive for the presence of cocaine.

7. On September 24, 2000, CS advised me that HELTON told the CS that HELTON was going to be receiving a large quantity of crack cocaine. HELTON told the CS that HELTON was "set up" near a specific Huck's store in Harrisburg, Illinois. The red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois, is

located less than 1 block from that same Huck's store in Harrisburg, Illinois, described by HELTON.

8. On September 25, 2000, CS purchased $400.00 worth of crack cocaine from MICHAEL HELTON in Harrisburg, IL. Prior to the transaction, law enforcement agents surveilled HELTON. HELTON was surveilled leaving the red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois. HELTON went directly from the foregoing described residence to the location where the crack cocaine transaction with the CS took place. CS was wearing recording equipment and agents were performing surveillance. The crack cocaine was field tested and tested positive for the presence of cocaine.

During the transaction, HELTON advised the CS that HELTON had 3 ½ ounces of crack cocaine left to distribute. Subsequent to the crack cocaine sale to the CS, law enforcement agents followed HELTON directly back to the red, wood-framed addition, which has a white door that faces west, and is believed to be a separate apartment attached to the rear of the residence at 436 West Poplar, Harrisburg, Illinois.

9. Having been involved in numerous investigations, I have come to learn that people who are involved in buying and distributing crack cocaine regularly keep records with the amounts of crack cocaine, customer names that they are selling to and the amount of money that the customers owe for the cocaine. I have observed that these records are kept at the location where the crack cocaine operation is set up or where the transactions occur. In addition, I have been told by numerous defendants who

have been involved in the delivery of crack cocaine and have observed myself on several occasions, that scales and packing material, including plastic bags, twisties and bread ties are usually kept in the same location with the crack cocaine. I have also observed that it is regular practice for individuals involved in selling cocaine to keep large quantities of United States currency and guns either on this person or at the same location.

FURTHER AFFIANT SAYETH NOT.

/s/ SA Tim Kirkham FBI
Tim Kirkham, Special Agent
Federal Bureau of Investigation

W. CHARLES GRACE
United States Attorney

/s/ George Norwood
GEORGE A. NORWOOD
Assistant U.S. Attorney

State of Illinois)
) SS.
County of FRANKLIN)

Sworn to before me, and subscribed in my presence on the 25 day of Sept., 2000, at Benton, Illinois.

/s/ Philip Frazier
PHILIP M. FRAZIER
United States Magistrate Judge